

DECISION-MAKING IN EXPANDING AMERICAN URBAN LIFE

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The purpose of this short paper is to invite attention to metropolitan problems from the standpoint of decision-making. It is a modest undertaking designed to provoke inquiry and reflection.

Certainly metropolitan developments on the American scene have not escaped notice. As a matter of fact, they have been largely submerged under a plethora of written and spoken words. There was a stage in the consideration of the subject during which discussion did not wait for inquiry and there seemed to be an almost irresistible impulse to come quickly to the articulation of solutions. At the well-planned and conducted National Conference on Metropolitan Problems, which was held at East Lansing, Michigan, in the spring of 1956, there was no checking the urge to come forward at the end with solemn conference conclusions.¹ This was a largely ephemeral exercise. Since then we have achieved greater restraint. The trend has been to focus upon particular metropolitan complexes and studies, a considerable number of which have been undertaken.² There is point in this: communities differ and this conditions the shaping of a plan in any particular community. In general terms, however, there is basis for the comment that the discussions of metropolitanism have grown a bit stale. Perhaps it can be approached from a fresh perspective. The immediate suggestion is that an approach be made from the standpoint of decision-making on public matters of metropolitan import.

One notes at once that there is a complex of factors, which are likely to be operative with respect to the determination of a given matter of public concern in the larger urban context. There is the public power structure, to which we will address ourselves in the first instance and in major part. There is the extragovernmental political power structure in which political leaders exercise primary influence. Finally, we note the private power structure, which comprehends various economic and other private groups. These must be taken into account in examining the situation with respect to the soundness and adequacy of the arrangements for the political organization of society viewed in terms of the decision-making function.

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¹ The report was reproduced in 6 Municipal Law Service Letter 1 (1956).

² See the listings of metropolitan studies in the current numbers of "Metropolitan Area Problems," a publication of the Conference on Metropolitan Area Problems.

VALUES

We cannot talk effectively about these matters *in vacuo*; we must talk to some end. What gives point and direction is that which people consider important. The deliberate stress here is upon values, that is, general and abstract ideas which influence action or choice in decision-making. The basic values of the modern democratic state have recently been identified as liberty, equality and welfare, supported by secondary or instrumental values, which have more definite thrust from the standpoint of their influence upon decision-making.³

The relation of the democratic value system to the division of governmental powers and the decision-making process in urban community life can be illustrated with two or three examples. One of the familiar instrumental values, associated with the basic value of human liberty, is the idea that decision-making should be at a level close to the people and, concomitantly, that public servants should be close to their masters. This is thought to serve the cause of liberty by protecting against the arbitrary exercise of governmental authority, by having authority and decision-making close to the people. As the theory goes, where the opportunity for popular participation and the gaining of maximum public understanding is greatest the likelihood of arbitrariness and imposition is least.

The application of the political value of keeping government close to the people in contemporary urban life is not easy. If decision-making is to be had at the level of the smallest appropriate community unit, we quickly find that some problems of the urban community have a fairly limited reach; others a more extensive range; and still others an area-wide scope. One way to meet this would be to devise special units of government for particular functions and to give each of those units a scope and a constituency as wide as the functional or service area. This approach is subject to at least two substantial objections. As we shall see, it has already been used to a large extent in the proliferation of *ad hoc* units of government, but with strong emphasis upon efficiency and management at the expense of political representation. In the second place, even if it were attempted to set up such special function units with politically accountable elected governing bodies, the system of local government would be made extremely diffuse and complex. Instead of three levels of government, there might be any number. Some elaboration is in order as to each of these objections.

Perhaps we have been too concerned with the business of government, with function, with good administration. Certainly this writer,

³ Ylvisaker, "Some Criteria for a 'Proper' Areal Division of Governmental Powers," in *Area and Power* 27, 30 *et seq.* (Maass ed., 1959).

as well as others, has stressed the functional ideas that governmental jurisdiction should be as wide as the service area and that power or authority should be proportioned to responsibility.⁴ Nor does he backwater on this. But such ideas do not occupy the whole stage. It might be that an *ad hoc* overlay of government for transit purposes, spanning a metropolitan area, would have much to commend it as a functional matter. If its governing body were a strictly appointive board without direct accountability to any constituency, would it be consistent with the American scheme of political values?⁵

It is a striking fact of our history that the contemporary proliferation of appointive *ad hoc* bodies with jurisdiction in urban life has kinship to the creation in the latter part of the 19th century of special commissions and boards, which were given some of the powers and responsibilities of local government at the expense of the general function units.⁶ Of course, the legislature often acted directly by special legislation in that earlier day and politics and corruption had their roles to play. There is a parallel, however, both in the diffusion of responsibility in official hands and in the absence of a popular voice in what goes on. So strong was the reaction against the 19th century development that the courts in several states gave limited recognition to a so-called inherent right to local self-government.⁷ Such extra-constitutional means of limiting legislative power distort the rational pattern of constitutionalism and they have not had great vitality. Within the constitutional framework the response has been limitations on special legislation, home rule provisions and prohibitions upon legislative granting of municipal powers to special boards and commissions.⁸

Some resort to *ad hoc* units of government is inescapable. We cannot do more than move on from where we are. We are compelled to adapt and experiment while we are on the move. In order to get the business of government done, we may find it necessary to use *ad hoc* arrangements as a short-range matter, even though we presently have clear ideas as to what should be done as long-range action. The immediate point, however, is that, recognizing all this, the political values associated with having governmental authority vested in repre-

⁴ Fordham, "Local Government in the Larger Scheme of Things," 8 Vand. L. Rev. 667, 668 (1955).

⁵ Shestack, "The Public Authority," 105 U. of Pa. L. Rev. 552, 568 (1957).

⁶ See *State ex rel. LeRoy v. Hurlbut*, 24 Mich. 44 (1871).

⁷ *State ex rel. Geake v. Fox*, 158 Ind. 126, 63 N.E. 19 (1902); *State ex rel. Jameson v. Denny*, 118 Ind. 382, 21 N.E. 252 (1889); *State ex rel. White v. Barker*, 116 Iowa 96, 89 N.W. 204 (1902).

⁸ The first two categories are too familiar to call for documentation. As to the third, see Colo. Const. art. V, § 35; Pa. Const. art. III, § 20.

sentative hands and having the representatives of the people as close to their masters as may be, cannot be pursued with unqualified fidelity. If the business of government were distributed among a great number of special function units and conducted by elected officers in those units, there would be such a melange of constituencies that the voter's head would swim. It would be highly unrealistic, moreover, because the extent of governmental service areas changes all the while and there are interrelationships between different functions. It seems clear that our general policy over the years to distribute power among a very limited number of levels of general function units has been a sound one, even though the size of a unit and the reach of a governmental function or problem do not always coincide.

An illustration with respect to the basic value of equality is in order. Racial discrimination has carried to the point in Alabama that the boundaries of the City of Tuskegee have been so redrawn by the legislature as to exclude a large number of Negro citizens from the franchise in the City and, thereby, to assure white supremacy.⁹ This is a case of jurisdictional lines being so defined as to subordinate the basic value of equality to the interest in white supremacy. Conversely, we find large urban centers in other parts of the country in which there is a desire in the central city to promote equality in private housing opportunities, but without the power to act on the subject beyond the corporate limits.¹⁰ Plainly the reach of the human shelter problem extends throughout the metropolitan area. Under present conditions the only way governmental action, which would cover the ground, could be taken would be by state legislation. A public policy against discrimination in private housing should doubtless be adopted and enforced at the state level in any event; the basic idea involved is of general application, although the most serious housing problems may be confined to the larger urban centers. The situation does illustrate, however, the difficulty of accomplishing effective decision-making at the urban community level in matters involving the realization of equality.

⁹ Ala. Act of 1957, p. 185. In a suit by negroes affected by the act to have it declared violative of the fourteenth and fifteenth amendments, the United States Court of Appeals rejected the constitutional claim in the absence of racial discrimination appearing on the face of the statute. *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959). The Supreme Court has granted review. 28 Law Week 3269 (March 22, 1960).

¹⁰ This problem is currently being confronted in Philadelphia, following failure of proponents to obtain enactment of state legislation at the 1959 regular session of the General Assembly. Pittsburgh earlier enacted a fair housing practices ordinance, following the lead of New York City.

STATE-LOCAL RELATIONS

In the state configuration the ultimate repository of political power is the electorate. In an Austinian sense, the state constitution is an organic law expressing the will of the electorate. If the constitution is written along simple organic lines with a minimum of detail, it does not involve direct decision-making in the sense with which we are concerned. It does draw lines of jurisdiction—that is, it makes a basic division of governmental authority. If the constitution departs from the organic concept and deals with specific subjects as by a provision dedicating particular public revenues to particular public purposes, it is entering the realm with which we are concerned and it may be affecting decision-making in the urban context.

It is necessary to distinguish between a primary division of power or jurisdiction and decision-making within the framework of that division. There has been noteworthy confusion in this respect as to local autonomy. The advocates of substantive constitutional home rule for municipalities have insisted upon a constitutional division of power as between the state and the indicated local units. This has resulted in constitutional home rule states providing more than local autonomy: it has involved some measure of political self-determination. It is entirely possible that adequate authority and responsibility for decision-making as to urban life can be granted to government at the local level without making a fixed constitutional division of power. Broad authority can be devolved upon local government subject to the ultimate authority of the legislature to deny or restrict.¹¹

At the present time there is no conception of home rule as broad as a metropolitan region; we have not been thinking of home rule in terms of an as yet undeveloped metropolitan jurisdiction. The home rule situation in Ohio, for example, is a fragmented affair.¹² A primary city and each of the peripheral or enclaved municipalities in that urban area has home rule powers in its own right.¹³

Constitutional home rule for a general-function metropolitan government would make a division of power that would render the position of the central government of the state less important. Carried far enough, it would greatly depreciate the position of the state government. This very point leads to consideration of a central problem in the area of this discussion.

¹¹ See American Municipal Association, "Model Constitutional Provisions for Municipal Home Rule" 19 *et seq.* (1953).

¹² Ohio Const. art. XVIII, § 3 makes a direct grant to each municipality (village or city) of all powers of local self-government. See the symposium on "Home Rule in Ohio," 9 Ohio St. L.J. 1 (1948).

¹³ Thus, the City of Columbus, the adjoining City of Upper Arlington and the enclaved City of Bexley all have home rule powers.

RELATIVE WEAKNESS OF THE STATE

It is obvious that an American state lacks both the cohesive elements of a national state associated with its independent stature in the international realm and the social, cultural and economic elements of the community which are likely to characterize an urban area. In other words, in a community sense, a state is a pretty artificial configuration. Even so, it would not be accurate to say that there is no state sense of community. An element of commonness has become a part of the state scheme of things through tradition and a long experience of sharing within the state framework. This is a fact of American society. When it is viewed along with the strongly vested political position of the states, the possibility that we might work out deliberately a better conceived division of the country into states is too slight to command our attention, no matter how pleasant the intellectual exercise.

What we are brought to is the question whether state governmental institutions and processes can be improved and strengthened to the point that the states will perform a significant role in the total conduct of human affairs. Certainly their governmental responsibilities within the federal framework are still very large with respect to a host of matters. These embrace the enactment and the administration of most of our private law as well as the basic system of criminal law. They comprehend public education, welfare services, highway and other elements of the circulatory system, and the system of local government.

We are at a stage at which it is a matter of first-rank importance in our system that the position of the state government be reexamined with a view to the action needed to gird them for their tasks, with particular reference to urban life and decision-making in that area. The state legislature is, in most states, clearly not now equal to the task of providing the needed governmental arrangements and flexibility of action demanded by the rapid development of metropolitan life. It is a part-time organ, with representation weighted against the urban centers, with a weak, understaffed committee system and antiquated procedures for policy-making. Nor is there encouraging concern about this situation. On the contrary, those of us who are pressing this point find it necessary to be pretty tough-minded and persistent to continue in the face of such overwhelming lack of interest.

There is the crucial area of fiscal powers in which the states, resting on limited geographical areas in a national economy, are at a distinct disadvantage as compared with the national government. How can the states maintain enough financial independence to prevent federal policy-dictation through the leverage of the purse? A partial

answer is that they can remove self-imposed restrictions. Consider the posture of Pennsylvania. The state constitution, as narrowly interpreted by the state supreme court, does not permit graduated income or succession taxes, nor even of personal exemptions and deductions for dependents under state or local flat-rate income taxes.¹⁴ The state's residents may be subjected to foreign income taxes on what they earn in other states or on income from property in other states, but Pennsylvania enjoys no reciprocal benefits. Nor, of course, does it take advantage of the fact that state income-tax payments are deductible in the computation of the federal income tax.

A basic step in the girding of the states for an important role is state constitutional revision. The Kestnbaum Commission on Intergovernmental Relations made the point effectively in its report to the President in June, 1955.¹⁵ The central problems are to provide strength and flexibility of action by removing the self-imposed shackles that abound in state constitutions and strengthening key institutions and processes, notably the legislative.¹⁶

AREAL DIVISION OF POWER

Some local decision-making is directed to the very division of power on an areal basis. So it is with annexation. In the case of a middle-sized city, not ringed by small municipalities, annexation may be a direct means of conforming municipal jurisdiction to the actual urban area. If the consent of voters or property owners in an area sought to be annexed is required by law, the power of decision is placed in their hands. Such a policy is embraced by the constitution of New York as to city annexation¹⁷ and the Temporary Commission on the Revision and Simplification of the Constitution is not recommending that it be modified.¹⁸ This is not a defensible policy even at the legislative level. To give it constitutional status is worse. The question is one of jurisdiction with the final word being left to only part of the people affected. Those people do not act, moreover, as an organized constituency; they speak as individuals. There is no plan or form to their participation in the decision. On the other hand, to

¹⁴ *Butcher v. City of Philadelphia*, 333 Pa. 497, 6 A.2d 298 (1938). Pa. Const. art. IX, § 1, provides that "all taxes shall be uniform upon the same class of subjects, within the limits of the territorial authority levying the tax. . . ." In contrast, the Ohio uniformity clause applies simply to ad valorem taxes. Ohio Const. art. XII, § 2.

¹⁵ Commission on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress* 56 (1955).

¹⁶ Fordham, "The State Legislative Institution" *passim* (1959).

¹⁷ N.Y. Const. art. IX, § 14.

¹⁸ The Temporary Commission on the Revision and Simplification of the Constitution, *First Steps Toward A Modern Constitution* 16, 17 (Leg. Doc. No. 58, 1959).

give the municipality seeking to annex the controlling voice would amount to enabling it to achieve unilaterally an extension of its jurisdiction.¹⁹

State policy can meet the problem by recognizing at the outset that local autonomy in conducting governmental affairs is one thing while the drawing of jurisdictional lines is another. Pursuing this, the annexation statute both embraces substantive standards governing annexation and places their application in the hands of a governmental authority independent of the municipality, the people and the area affected. The well-known Virginia plan employs the judiciary as the independent agency.²⁰ Alaska²¹ and Minnesota²² have rested the responsibility upon state administrative bodies. This is a development which excites interest. It is calculated to provide an agency and a process for taking both the larger and the more particular community interests into account.

The same can be said with respect to the creation of new local jurisdictions. One of the difficulties which plague us in the organization of urban life is the ease with which new municipalities may be erected in the urban fringe.²³ Old statutes in many states, Ohio included,²⁴ have little policy content and do not give heed to the relation of a proposed new incorporation to the interests and structure of the larger community.

NATIONAL POWER

There are three aspects of national power which are likely to have an increasingly important bearing upon the American urban scene. Congress has a number of primary powers which are applicable. They include the power to regulate interstate and foreign commerce, the power to provide for the common defense, the postal power and the

¹⁹ This is the Texas policy as to home rule cities. Tex. Rev. Civ. Stat. art. 1175 (Vernon, 1953).

²⁰ Va. Code § 15-152.2 *et seq.* (1950).

²¹ Alaska Const. art. X, § 12.

²² "A local boundary commission or board shall be established by law in the executive branch of the state government. The Commission or board may consider any proposed local government boundary change. It may present proposed changes to the legislature during the first ten days of any regular session. The change shall become effective forty-five days after presentation or at the end of the session, whichever is earlier, unless disapproved by a resolution concurred in by a majority of the members of each house. The commission or board, subject to law, may establish procedures whereby boundaries may be adjusted by local action."

²³ Minn. Laws of 1959, c. 686.

²⁴ Mandelker, "Standards for Municipal Incorporations in the Urban Fringe," 36 Tex. L. Rev. 271 (1958).

²⁵ See Fordham and Dwyer, "Municipal Incorporation and Territorial Changes in Ohio," 13 Ohio St. L.J. 503 (1952).

banking and currency powers. The independent exercise of these powers condition decision-making at the state and local levels. Secondly, the spending power affords great leverage. In the third place, interstate cooperation as to urban affairs is increasingly important as urbanization reaches over state lines and interstate compacts are subject to Congressional approval.

The first two categories are pretty familiar stuff. There is an awareness that they are enough to give the central government of the nation a dominant role in the further attack upon urban problems, unless the states seize the day as already suggested. We cannot expect a void; if the states do not respond to urban questions the national government eventually will.

The implications of federal power under the compact clause are less familiar ground. The potential of the interstate compact as a means of achieving sound governmental arrangements in a multi-state urban area has hardly been scratched. It has been used not a little on an *ad hoc* basis to provide a type of special function overlay of government, but key questions as to responsiveness to the popular will have not been answered.²⁵ A current proposal for the creation of a national capital transit authority for the District of Columbia metropolitan area, contemplates that the federal unit would be supplanted in time by an interstate agency, established by a District of Columbia-Maryland-Virginia compact. The question of local participation in the control of the agency has been noted but left open.²⁶

Congress can attach conditions to its consent to an interstate compact.²⁷ It can exact federal participation in an interstate governmental arrangement established by compact.²⁸ It probably can revoke its consent even where the power to do so has not been expressly reserved.²⁹ Thus, federal influence as to compacts can be great. Given

²⁵ Representative Celler has introduced H.J. Res. 615 in the second session of the 86th Congress with the object of so amending the broad consent of Congress to the New York Port Authority Compact as to require submission of all future compact amendments to Congress and require reporting and disclosure to Congress about Authority operations. A *New York Times* editorial of March 28, 1960, criticized him for attacking home rule in the New York port area but it expressed no concern about popular participation other than through the state legislatures and the governors.

²⁶ 106 Cong. Rec. 4971 *et seq.* (daily ed. March 14, 1960).

²⁷ This must be evident as to any condition which does not go beyond what Congress could exact directly by exercise of another constitutional power.

²⁸ In the case of the important Ohio River Valley Water Sanitation Compact, for example, it is provided that the United States, as well as each participating state, shall have three representatives on the interstate commission. 54 Stat. 752 (1940).

²⁹ The writer cannot point to judicial authority here. He notes that the action of Congress in consenting to a compact is political and not contractual, that the contract clause does not apply to the United States in any event and that Congress could

vigorous state government, there is basis for the expectation that the national government would be working with participating states on a basis of cooperation rather than dictation in the development of multi-state metropolitan governmental arrangements by compact.

EXTRA-GOVERNMENTAL POLITICAL POWER

Extra-governmental political power is a major force in urban decision-making. At the state level it bears on the legislative attitude as to local structure and powers. If in a bicameral legislature one major party, which is largely rural, small-town and suburban in its representation, controls one house and the big city party controls the other, it is likely to take some sort of political bargain to get something that is desired by the large cities. Legislative decisions are commonly made by party caucus, not through the process of debate and deliberation.³⁰

On the local scene the real decision-making may take place outside the formal governmental framework if the party voice is strong enough. And where intergovernmental cooperation is called for as to a matter affecting a number of local units a veto by one political boss may result in a negative decision.

These forces cannot be fully taken into account and evaluated without identification and adequate information. But they do not operate altogether in broad daylight. What this means is that it is difficult to reckon with them deliberately in community decision-making. Even if they are brought into the open, the moral sense of the community may not be strong enough to have the quality and effect of strong sunlight. Regulation of political activity can be flouted as can laws against extortion and bribery. Vigorous political opposition, like cross-examination in the judicial forum, is a likely check.

The more complex the urban community and the more diffuse the distribution of extra-governmental political power, the more difficult the problem of making effective decisions of metropolitan application. This, in short, is roughly what one might say as to the governmental situation.

PRIVATE POWER STRUCTURE

We are generally conscious of a so-called private power structure in community life. In some communities, even of large size, it may be readily identifiable.³¹ A sizeable urban community may be largely

hardly, by consenting to a compact, be said to have restricted any of its other constitutional powers.

³⁰ This is a commonplace feature of the legislative process in Pennsylvania, for example.

³¹ A few powerful business and financial figures have been central to the tremendous development that has been taking place in downtown Pittsburgh.

dominated by one individual. More commonly, the situation is much more complex than this. In a major urban center one is likely to find a number of non-profit civic and welfare organizations of standing and some influence as well as powerful business leaders who can bring great weight to bear on questions of importance to them. There is, of course, no official or other established means of regularizing private activities directed to local decision-making. They, like political activities, are not fully in public view and they are difficult to assess. They must be reckoned with, however, as live elements in the total complex.

CONCLUSION

It has not been the object of this paper to press for the establishment of metropolitan units of government which are general function in character. It may be that the Toronto approach, which gives effect to the idea that a metropolitan government should have jurisdiction over public affairs of a metropolitan sweep, will be embraced in a number of American metropolitan areas.³² The writer is disposed to think that in time we shall be forced to resort to some kind of overlay of government which will provide the framework and the process for decision-making and administration on an area-wide basis. Meanwhile, there is room for a deal of research in the actualities of decision-making of metropolitan significance. Data and insights as to the "is" should assist us in reaching conclusions as to the "ought." Meanwhile, too, the division of powers and jurisdiction is so fragmented, both vertically and horizontally, that intergovernmental cooperation is indispensable in decision-making. This bespeaks efforts to encourage and facilitate communication and cooperative action on matters of common concern.

³² For a description and evaluation of the Toronto development, see Milner, "The Metropolitan Toronto Plan," 105 U. of Pa. L. Rev. 570 (1959).